ANOTHER "ASSAULT UPON THE CITADEL": LIMITING THE USE OF NEGOTIABLE NOTES AND WAIVER-OF-DEFENSE CLAUSES IN CONSUMER SALES

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I. INTRODUCTION

"The assault upon the citadel of privity is proceeding in these days apace."[1] It is doubtful that the master stylist, Justice Cardozo, could have foreseen how adaptable his metaphor would prove to be. Dean Prosser, himself a stylist of note, used it in his classic descriptions of the "fall" of the privity of contract defense in products liability cases.[2] It is he who is primarily responsible for burning the dictum into the memory of a generation of lawyers.[3] Can others of us who use it be blamed for recognizing a good thing when we see it?

Another "assault" which is going forward in the consumer sales area has as its objective ("citadel") the use of negotiable notes or waiver-of-defense clauses in contracts, whereby Transferee of Dealer may successfully proceed against Buyer despite the existence of a defense (such as failure of consideration or breach of warranty) which the latter could interpose if sued by Dealer. The ornithological breakdown of the combatants, who on occasion will remark that this is "a different kind of war," is roughly as follows: the "hawks" come mainly from the ranks of the academic community and the executive branch of the government. The "doves" are, for the most part, businessmen engaged in consumer credit activity. Judges and legislators can be found in both camps, and there are a wide variety of other species.

The militant "hawk" sees this war as part of the "larger struggle" for the protection of consumers ("victims of aggression"), and he presses for total abolition ("unconditional surrender"). He is, therefore, disinclined to negotiate a compromise, believing that such a negotiated settlement ("appeasement") would only encourage the

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1 Ultrameres Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

2 Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

3 A student who quoted the Cardozo dictum in his examination booklet appended this postscript: "I want you to know this is the first thing I have memorized since The Charge of the Light Brigade in the seventh grade."

enemy to greater, long-term effort. He favors escalation of the conflict and demands nothing short of military victory.

The extreme "dove," on the other hand, believes the war to be totally misconceived and misdirected. ("The wrong war, in the wrong place, at the wrong time.") He sees it as but another attempt by the "establishment" ("the industrial-military complex") to impinge upon the freedom of market participants to handle their own affairs. He questions whether there can be such a thing as a real military victory and insists the war effort is diverting resources from "domestic" programs, such as consumer "education." In short, he favors "unilateral withdrawal."

The "citadel" in this instance appears to be firmly established in both law and practice. The emergence in our legal system of the concept of negotiability has been of inestimable value in facilitating commercial transactions. It is an important part of "the triumph of the good faith purchaser," aptly characterized as "one of the most dramatic episodes in our legal history."[4] A high-energy economic system is dependent upon the free flow of commerce; accordingly, impediments to voluntary commercial exchange should be kept to a minimum.[5] If the purchaser of a right evidenced by a negotiable note can prevail despite the availability of "personal defenses" of the maker, the inducement to purchase will be intensified. Increasing the purchaser's risk, as by refusing to provide insulation against such defenses of the maker, would, inexorably, tend to depress purchases. This all builds toward the implementation of a basic policy or presupposition of our commercial law structure: that a high volume of economic exchange is a prime social desideratum.[6] Similarly, the freedom of contracting parties to insert in the agreement a clause whereby one of them waives certain defenses as against the other's transferee will likely have the salutary effect of expediting transactions. Indeed, the insertion of a waiver clause is an attempt to achieve "negotiability by contract"; *i.e.*, an attempt to invest the contract

4 Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

5 *See generally* I. PATERSON, THE GOD OF THE MACHINE (1964), for a fascinating study of the political, economic and social conditions believed to be conducive to a dynamic economy.

6 "I do not think there is any single fact more important for men to recognize, with all its implications, than this single one—*that their individual well-being, as well as that of the whole society, is determined by the volume of exchanges going on in the whole society.*" H. SCHERMAN, THE PROMISES MEN LIVE BY 393 (1938) (italics in original).

with negotiable qualities without compliance with the usual statutory formalities of negotiable instruments. There is here, also, the added fact that our tradition has been one of maximizing the power of parties to establish, by agreement, the obligations they wish to assume. This freedom of contract is but one manifestation of a basic freedom of thought and action endemic to our social system. Even as to that minority group called businessmen, we presume a permission to do whatever is not lawfully forbidden. The burden of justifying a limitation upon freedom of action, including freedom of contract, is upon the one who insists upon the restraint. Professor Havighurst put it well: "Just as there must be 'freedom for the thought that we hate,' so there must also be, in a measure, freedom for the contract that we hate."[7]

II. "THE ASSAULT UPON THE CITADEL . . ."

The "assault" is mounted by an impressive coalition of forces, employing the most potent and sophisticated of weapons. The attack is coordinated with a massive effort being waged in the courts, the legislatures, the legal periodicals, the popular press, and elsewhere, under the banner of "consumer protection" or "consumer rights." Neither the general war nor the isolated battle is new to our time,[8] but the conflict is building to unprecedented intensity as new offensives are being unleashed.[9] There will, perforce, be little room

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7 H. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 124-25 (1961).

8 *See* Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U.L. REV. 751 (1965). Professor Friedman, in this thoughtful article, refers to historical examples of judicial and legislative erosion of the traditional doctrine protecting holders in due course of negotiable instruments executed by consumers. He cites a 1901 Wisconsin statute which required "that any promissory note 'taken or given for any lightning rod, patent, patent right, stallion, or interest therein' must bear on its face 'in red ink' the words: 'The consideration for this note is the sale of a lightning rod, patent, patent right, stallion, or interest therein.' Notes subject to the statute were non-negotiable." He comments: "The seemingly strange Wisconsin list was actually a catalogue of some common ways in which certain smooth operators induced farmers to part with their hard-earned money." *Id.* at 758-59.

9 Potentially, the most significant is the draft of a Uniform Consumer Credit Code being prepared under the auspices of the National Conference of Commissioners on Uniform State Laws. This "U3C" will be a comprehensive regulatory statute touching many aspects of consumer credit, incidental features of which will be to limit substantially the use of waiver-of-defense clauses and negotiable instruments in consumer transactions. *See* Jordan and Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441 (1967). As an aside, a friend remarked that to be exposed to a U.C.C.C. after just becoming accustomed to the U.C.C. is apt to make one "C"-sick! [See note 1 to Prof. Spanogle's article, this issue.—ED.].

for neutral observers, and, to leave the metaphor, debate on all aspects of all questions becomes imperative.

Turning, first, to waiver-of-defense clauses, what are the objectives of those who would deny parties the freedom to agree, in a sales contract, that ordinary defenses available against the seller cannot be asserted against his transferee? Many arguments have been advanced in the legal periodical literature and the cases, ranging from an insistence that such clauses are *per se* objectionable as violative of public policy to a claim that the use of such clauses in certain types of transactions (notably, consumer sales) is unfair and the practice should be curtailed. For example, it has been said that such clauses are violative of public policy as attempts to confer negotiability upon writings without compliance with formalities prescribed by statute.[10] But while some insist that these clauses are inherently objectionable, most of the criticism is based upon their use in consumer sales where they are made part of standard form contracts which are often never read or understood by the purchaser.[11] This case for abolition draws heavily upon market experience which

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10 Equipment Acceptance Corp. v. Arwood Can Mfg. Co., 117 F.2d 442 (6th Cir. 1941); American Nat'l Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 P. 376 (1923); Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 P. 705 (1931); Industrial Loan Co. v. Grisham, 115 S.W.2d 214 (Mo. Ct. App. 1938). *See also* Quality Finance Co. v. Hurley, 337 Mass. 150, 148 N.E.2d 385 (1958).

11 Conditional sale contracts are invariably written by sellers and finance companies for sellers and finance companies. They are often printed in unconscionably small type and presented to the buyer as a mere formality to be gotten out of the way after the parties have come to terms on price. Sometimes they are not even identified as conditional sale contracts but are euphemistically labeled "Easy Payment Plan" or something of the sort. The seller is usually justified in believing either that the buyer will not read the contract at all or will not understand it if he does wade through it. Even were the buyer to read and comprehend the avalanche of legal consequences which would greet any default on his part, there is not much he can do about it, for if he wants to buy an automobile or an appliance of some sort . . . on the installment plan he must sign one conditional sale contract or another, and they are all pretty much alike. There is no indication that competition in the automobile or appliance businesses, however keen, has extended to the point where dealers attempt to attract buyers by offering them a more favorable contract. It is against this background that we must view the plight of [a buyer] who staggers into a contract which could make him liable to pay the full price of an air-conditioning unit to a finance company, with which he had not even directly dealt, even though the vendor sells him a defective article . . . .

Warren, *Tools of Chattel Security Transactions in Illinois*, 1956 ILL. LAW FORUM 531, 543.

strongly indicates a lack of awareness on the part of the consumer and consequent absence of meaningful negotiation regarding such clauses. This data leads to a re-examination of freedom of contract in this context. It is contended that these clauses are hardly ever the product of informed, voluntary choice; hence, their invalidation in no way diminishes genuine free choice. There are others, of course, who believe that freedom of contract is too highly touted anyway, being based, it is sometimes said, on a now discredited laissez-faire economics.[12] Increasingly, writers are placing this and other related questions within the larger frame of consumer protection as an avowed effort to secure "social justice" for the impoverished.[13] The abolition of the waiver clause is thus viewed as but one step, and perhaps a minor one, in an all-out program for the protection of "unorganized consumers."[14] The goal is sometimes stated in terms of equalizing the bargaining power of the participants,[15] the arguments here being reminiscent of the labor law debates of the 30's.

The related question of using negotiable promissory notes in consumer sales involves virtually the same policy considerations. Again, it is urged that the use should be prohibited outright. The most telling objection is that ordinarily the buyer is not aware of the legal effect of signing a negotiable note.[16] It is argued the average buyer does not, and cannot be expected to, realize that defenses which he has against the merchant might not be available in a suit by the holder. One judicial critic said: "The average citizen, and particularly the financially unimportant, [is] no more likely to know

12 *E.g.*, Shuchman, *Consumer Credit By Adhesion Contracts*, 35 TEMP. L.Q. 125 (1962).

13 *E.g.*, Willging, *Installment Credit: A Social Perspective*, 15 CATHOLIC U.L. REV. 45 (1965).

14 *See* Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966). Frequent reference is made in contemporary literature to the "unorganized" consumers. Perhaps President Kennedy set the style in his 1962 message to Congress concerning consumer programs: "Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economy who are not effectively organized . . . ." 108 CONG. REC. 4167 (1962).

15 *E.g.*, Note, *New Consumer Credit Reforms in Illinois*, 17 DE PAUL L. REV. 194 (1967).

16 *See* Friedman, *supra* note 8. Professor Friedman, recalling the law merchant origins of negotiable instruments, reminds us that the rules of negotiable instruments were originally "class rules," binding only that group (merchants) who could be expected to know the legal effect of such instruments.

the law of negotiable paper . . . than the holding in Shelley's Case."[17] But even if, perchance, the buyer should know something of the law of negotiable paper (as, for example, that a failure of consideration defense cannot be successfully interposed in a suit by a holder in due course) it is nonetheless inappropriate to apply that law in the usual, garden-variety case. This argument relies heavily upon the history of negotiable instruments. Emphasis is placed upon the fact that it was the facilitation of negotiation that precipitated recognition of the negotiable note. It was desirable that these instruments be able to circulate freely; hence, impediments were discouraged. But, it is argued, in consumer cases it is rare that the instrument travels beyond the safe of the first transferee, the financial institution which purchases the paper from the merchant. Thus, the basic reason for insulating the holder from defenses the maker has against the payee vanishes. *Ergo . . . cessante ratione legis, cessat et ipsa lex.*[18]

Supporting reasons for denying holder in due course status to the purchaser of consumer paper are of a more pragmatic nature. To deprive the consumer of the right to withhold payment is to deprive him of the most potent weapon he has to enable him to receive that which he was promised. Although he does retain his right to proceed against the merchant after making payment to the financer, this, realistically, may be quite illusory. Apart from the burden of securing legal representation (the cost of which may be prohibitive in light of the amount involved), there is no assurance that a judgment against the merchant can be collected. By contrast, one could reasonably expect a financial institution both to investigate carefully the merchants from whom it buys paper and to arrange for reimbursement (through repurchase agreements, reserve accounts, buying the note with recourse, etc.) for losses sustained by reason of the merchants' defaults.[19] The added cost to the financer might ultimately result, because of higher discount rates, in increased costs to consumers, but this, on balance, is still a more intelligent way to proceed. Better to have the financial institution bear this cost initially; it is usually in a better position to absorb the cost and can spread the

17 Buffalo Indus. Bank v. De Marzio, 162 Misc. 742, 743, 296 N.Y.S. 783, 785 (Buffalo City Ct. 1937).

18 The reason for the law ceasing, the law itself ceases. *See* Jones, *Finance Companies as Holders in Due Course of Consumer Paper*, 1958 WASH. U.L.Q. 177. Professor Jones calls this the problem of ". . . the negotiable instrument which is never negotiated." *Id.* at 191.

19 *See* Note, *Consumer Sales Financing: Placing the Risk for Defective Goods*, 102 U. PA. L. REV. 782, 791-93 (1954).

risk over the entire business. Finally, it is contended that the experience in states where the financer does not obtain holder in due course status does not indicate that the consequences are such as to either curtail the purchase of consumer paper or significantly increase the costs.[20]

III. " . . . Is Proceeding In These Days Apace."

How have the foregoing arguments, or variants thereof, fared in the courts and in the legislative assemblies? There is, first of all, a trend in the cases favoring some circumscription of holder in due course status for financial institutions purchasing consumer paper from merchants.[21] Likewise, there is legislation of comparatively

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20 Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. Ind. & Com. L. Rev. 535, 551-52 (1967); Sutherland, *Article 3—Logic, Experience and Negotiable Paper*, 1952 Wis. L. Rev. 230, 239-40; Vernon, *Priorities, the Uniform Commercial Code and Consumer Financing*, 4 B.C. Ind. & Com. L. Rev. 531, 547 (1963).

> It has been suggested that from both the buyer's and financing agency's point of view, the issues of negotiability and waiver of defense have been greatly exaggerated in importance. It is said that the financing agency, prior to asserting its rights against the buyer, will attempt to settle honest claims by having the dealer make appropriate adjustments, thereby preserving the latter's reputation in the community. Failing this, resort will be had to the dealer's reserve account or his recourse indorsement. Only in cases where the dealer is insolvent, or where the financing agency and he are united in interest, will the buyer be called upon to make good his promise even though the seller has not performed his part of the bargain. Thus, it is argued, only in an infinitesimal number of retail installment sale transactions is the buyer harmed by his agreement to waive his defenses or by having given a negotiable instrument.
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> Conceding that no protection is needed in the vast majority of cases, protection in the remaining ones must come from the legislature, for it is also agreed that the buyer is unable to provide it for himself. Moreover, to say that the problem is not substantial is to look only to the reported decisions, few in number. It is to overlook the larger number of cases which either never reach an appellate level or never go to trial. The buyer who is being protected by retail installment legislation is normally one who cannot afford the luxury of a lawsuit and may, therefore, be forced as a practical matter to submit to the demands of the financing agency though he has an otherwise valid claim.

Project, *Legislative Regulation of Retail Installment Financing*, 7 U.C.L.A. L. Rev. 618, 750 (1960).

21 For exhaustive annotation, see 44 A.L.R.2d 8 (1955) and supplemental material. *See also* Jones, *Finance Companies as Holders in Due Course of Consumer Paper*, 1958 Wash. U.L.Q. 176, for a comprehensive survey of judicial opinion dealing with this subject.

recent vintage withdrawing such status.[22] A concomitant trend, in both case law and legislation, can be discerned as regards waiver-of-defense clauses.[23] Indeed, the most striking development of all has been the emergence of important statutes prohibiting or limiting the use of waiver clauses in various types of consumer transactions.[24]

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22 Cal. Retail Installment Sales Act, CAL. CIV. CODE §§ 1803.2(a), 1810.9 (West Supp. 1967); Conn. Home Solicitation Sales Act, PUB. ACT 749 (West Conn. Leg. Ser. 1063, 1967); Del. Retail Installment Sales Law, DEL. CODE ANN. tit. 6, § 4342 (West Supp. 1966); Hawaii Retail Installment Sales Act, HAWAII REV. LAWS § 201A-17(d) (Supp. 1965); Ill. Consumer Fraud Act, ILL. ANN. STAT. ch. 121½, § 262D (Smith-Hurd Supp. 1967); Md. Retail Installment Sales Act, MD. ANN. CODE art. 83, § 147 (1957); Mich. Home Improvement Finance Act, MICH. COMP. LAWS § 445.1207 (1967); N.Y. Retail Installment Sales Act, N.Y. PERS. PROP. LAW § 403(1), (2) (McKinney, 1962); Pa. Home Improvement Finance Act, PA. STAT. ANN. tit. 73, § 500-207 (Supp. 1967); Pa. Motor Vehicle Sales Finance Act, PA. STAT. ANN. tit. 69, § 615(g) (1965); Pa. Goods and Services Installments Sales Act, PA. STAT. ANN. tit. 69, § 1302, 1909 (Supp. 1967); Vt. Consumer Fraud Act, VT. STAT. ANN. tit. 9, § 2455 (Supp. 1967); Wash. Credit Disclosure Act, WASH. REV. CODE ANN. § 63.14020 (Supp. 1967). *Cf.* Ill. Retail Installment Sales Act, ILL. ANN. STAT. ch. 121½ § 517 (Smith-Hurd Supp. 1967); Ill. Motor Vehicle Sales Act, ILL. ANN. STAT. ch. 121½, § 576 (Smith-Hurd Supp. 1967).

23 *See* 44 A.L.R.2d 8, 92-96, 162-72 (1955) and supplemental material.

24 Alaska Retail Installment Sales Act, ALASKA STAT. § 45.10.140 (1962); Cal. Automobile Sales Finance Act, CAL. CIV. CODE § 2983.5 (West Supp. 1967); Cal. Retail Installment Sales Act, CAL. CIV. CODE §§ 1804.1-.2 (West Supp. 1967); Conn. Home Solicitation Sales Act, PUB. ACT 749 (West Conn. Leg. Ser. 1063, 1967); Del. Retail Installment Sales Act, DEL. CODE ANN. tit. 6, § 4311-2 (West Supp. 1966); Hawaii Retail Installment Sales Act, HAWAII REV. LAWS § 201A-17(d) (Supp. 1965); Ill. Consumer Fraud Act, ILL. ANN. STAT. ch. 121½, § 262D (Smith-Hurd Supp. 1967; Mass. Retail Installment Sales and Services Act, MASS. ANN. LAWS ch. 255D, § 10 (1968); Mich. Home Improvement Finance Act, MICH. COMP. LAWS §§ 445.1206, 445.1208 (1967); Mich. Retail Installment Sales Act, MICH. COMP. LAWS §§ 445.864, -5 (1967); Miss. Motor Vehicle Sales Finance Act, MISS. CODE ANN. § 8075-13 (Supp. 1966); Nev. Retail Installment Sale of Goods and Services Act, NEV. REV. STAT. § 97.275 (1965); N. Mex. Retail Installment Sales Act, N.M. STAT. ANN. § 50-16-5 (Supp. 1967); N.Y. Retail Installment Sales Act, N.Y. PERS. PROP. LAW § 403(1), (2) (McKinney, 1962); N.Y. Motor Vehicle Retail Installment Sales Act, N.Y. PERS. PROP. LAW § 302 (McKinney Supp. 1967); Pa. Home Improvement Finance Act, PA. STAT. ANN. tit. 73, § 500-409 (Supp. 1967); Pa. Motor Vehicle Sales Finance Act, PA. STAT. ANN. tit. 69, § 615 (1965); Pa. Goods and Services Installment Sales Act, PA. STAT. ANN. tit. 69, §§ 1401, 1402 (1967); Tex. Retail Installment Sales Act, TEX. REV. CIV. STATS. ANN. art. 5069-6.07 (Vern. Supp. 1967); Tex. Motor Vehicle Installment Sales Act, TEX. REV. CIV. STATS. ANN. art. 5069-7.07, -8 (Vern. Supp. 1967); Vt. Consumer Fraud Act, VT. STAT. ANN. tit. 9, § 2455 (Supp. 1967); Wash. Credit Disclosure Act, WASH. REV. CODE ANN. § 63.14.020 (Supp. 1967). *Cf.* Ill. Retail Installment Sales Act, ILL. ANN. STAT. ch. 121½, § 517 (Smith-Hurd Supp. 1967); Ill. Motor Vehicle Retail Installment Sales Act, ILL. ANN. STAT. ch. 121½, § 576 (Smith-Hurd Supp. 1967).

A. *Judicial Developments*

A 1967 decision of the Supreme Court of New Jersey, *Unico v. Owen*,[25] is illustrative of a developing judicial attitude. The case has the classic syndrome—(1) enticement by advertising (140 albums of stereophonic records for 698 dollars, plus a Motorola stereo record player "without separate charge"); (2) seller's agent contacting customer at home, with the resultant execution of a printed form "retail installment contract" or time payment plan and a negotiable promissory note; (3) fine print clauses in the contract, including an undertaking by the buyer "not to set up any claim against such seller as a defense, counterclaim or offset to any action by any assignee for the unpaid balance of the purchase price or for possession of the property"; (4) the immediate assignment of the contract and negotiation of the note to the plaintiff finance company (on forms supplied by the plaintiff and with the latter's name printed as assignee); (5) the subsequent realization by the buyer that written terms were not congruent with what he was led to believe on the basis of the advertisement; (6) the seller's subsequent insolvency and default in performance;[26] and (7) the plaintiff, as assignee of the contract and holder of the note suing for the balance due, claiming that failure of consideration is unavailing as a defense in view of (a) the waiver clause in the contract and (b) its status as holder in due course of the note.

The defendant won in the trial court, and the appellate division affirmed. The supreme court's affirmation was accompanied by an opinion of Justice Francis, speaking for a unanimous court. Justice

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25 50 N.J. 101, 232 A.2d 405 (1967).

26 The lack of congruence between advertisement and contract was striking. Instead of a "free stereo" accompanying the purchase of 140 record albums for the price of 698 dollars, there was an agreement to pay 819.72 dollars over a three year period in monthly installments of 22.97 dollars. The 819.72 dollars included cash price of 698 dollars, "official fee" of 1.40 dollars (presumably cost of recording contract in County Register's Office) and "time price differential" or interest of 150.32 dollars, less 30 dollars down payment. More significantly, while the payments were to be made over a three-year period, the delivery of the albums, at the rate stipulated in the contract (12 at the inception, 12 at six month intervals) would take five years and four months! As the court remarked, "this means that 40% of the albums, although fully paid for, would still be in the hands of the seller." *Id.* at 107-08, 232 A.2d at 409.

The buyer received the stereo player and the original 12 albums, but despite his continuing to pay 12 monthly installments (total 303.24 dollars, including 30 dollars down payment) he never received another album. The deliveries ceased because of the seller's insolvency.

Francis, it will be recalled, was the author of the opinion in *Henningsen v. Bloomfield Motors.*[27] *Henningsen* proved to be a most potent weapon in the "assault upon the citadel of privity." It is quite possible that *Unico,* like *Henningsen,* will become a landmark. Neither opinion breaks new ground or offers a startlingly innovative approach, but each is a forthright, carefully documented exposition that comes along at a propitious moment.

The court was able to point to a significant and growing body of case precedent, where, in comparable situations, the plaintiff failed to qualify as a holder in due course.[28] In general, this refusal to insulate the holder from ordinary personal defenses of the maker (failure of consideration, breach of warranty, fraudulent misrepresentation, etc.) has been predicated upon the "close connection," "participation" or "involvement" of the holder in the transaction as indicative of a lack of good faith.[29]

This fascinating chapter of negotiable instruments law began with *Commercial Credit Co. v. Childs,*[30] a 1940 decision of the Arkansas Supreme Court. It was a typical transaction: Buyer executes a conditional sales contract and installment note; Dealer sells the paper to Finance Company. What was atypical was Buyer's ability to assert against Finance Company a defense based on Dealer's fraudulent misrepresentation. The defense was not one which could, by statute, be asserted against a holder in due course absent a showing of actual knowledge. The court explained its position as follows:

> We think appellant was so closely connected with the entire transaction or with the deal that it can not be heard to say that it, in good faith, was an innocent purchaser of the instrument for value before maturity. It financed the deal, prepared the instrument, and on the day it was executed took an assignment of it from [the dealer]. Even before it was executed it prepared the written assignment thereon to itself. Rather than being a purchaser of the instrument after its execution it was to all intents

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27 32 N.J. 358, 161 A.2d 69 (1960).

28 The note was executed on November 6, 1962, after New Jersey had adopted the U.C.C. but before its effective date of January 1, 1963. Therefore, the requirements of due course holding were those specified in the Uniform Negotiable Instruments Act.

29 *See* note 21 *supra.*

30 199 Ark. 1073, 137 S.W.2d 260 (1940). Taylor v. Atlas Security Co., 213 Mo. App. 282, 249 S.W. 746 (1923), can be viewed as an antecedent of *Childs,* but the court in *Taylor* emphasized evidence from which actual knowledge of the dealer's fraud could be inferred. *See* Note, *Finance Company as a Holder in Due Course,* 28 NOTRE DAME LAWYER 251 (1953).

> and purposes a party to the agreement and instrument from the beginning.[31]

The wedge had entered. Hereafter, counsel throughout the country would be citing *Childs*. The effort would prove futile in most cases, but there would be notable successes as well. Moreover, as time goes on the rationale for a *Childs*-like approach becomes more explicitly keyed to considerations of consumer protection. For example, in *Mutual Finance Co. v. Martin*,[32] an influential Florida case, the court remarked:

> It may be that our holding here will require some changes in business methods and will impose a greater burden on the finance companies. We think the buyer—Mr. & Mrs. General Public—should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealer's insolvency than the buyer and in a far better position to protect his interests against unscrupulous and insolvent dealers.[33]

The "close participation" doctrine thus emerged and developed within the context of consumer financing where the goods are purchased for personal, family or household purposes. This is not to say that the doctrine has not been implemented in non-consumer, commercial cases, or that the requisite participation or involvement might not there be sufficient to negate good faith on the part of the transferee.[34] But it is in the consumer area that the underlying rationale seems most persuasive and where the impact has been the greatest. For example, in *Unico v. Owen*, the New Jersey court, after stating that it was "concerned here with a problem of consumer goods financing,"[35] proceeded, after the fashion of *Henningsen*, to detail reasons for the special treatment of standardized financing contracts involving the consumer goods purchaser. The issue was posed as

> the basic problem in consumer goods sales and financing . . . of balancing the interest of the commercial community in unrestricted negotiability of commercial paper against the interest of installment buyers of such goods in the preservation of their normal remedy of withholding payment when, as in this case,

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31 Commercial Credit Co. v. Childs, 199 Ark. 1073, 1077, 137 S.W.2d 260, 262 (1940).

32 63 So. 2d 649 (Fla. Sup. Ct. 1953).

33 *Id.* at 653.

34 *E.g.*, International Finance Corp. v. Rieger, 272 Minn. 192, 137 N.W.2d 172 (1965); Commercial Credit Corp. v. Orange County Machine Works, 34 Cal. 2d 766, 214 P.2d 819 (1950).

35 Unico v. Owen, 50 N.J. 101, 110, 232 A.2d 405, 410 (1967).

> the seller fails to deliver as agreed, and thus the consideration for his obligation fails.[36]

A similar emphasis upon the consumer aspects of the transaction is discernible in the court's invalidation of the waiver-of-defense clause. It took cognizance of section 9-206(1) of the Uniform Commercial Code which provides that "[s]ubject to any statute or decition which establishes a different rule for buyers of *consumer goods*" (emphasis added), a waiver-of-defense clause is valid. "In this section of the Code," the court states, "the Legislature recognized the possibility of need for special treatment of waiver clauses in consumer goods contracts."[37] After referring also to section 2-302 of the Code pertaining to "unconscionable contracts," the court concludes: "We see in the enactment of these two sections of the Code an intention to leave in the hands of the courts the continued application of common law principles in deciding in consumer goods cases whether such waiver clauses as the one imposed on Owen in this case are so one-sided as to be contrary to public policy."[38]

B. *Legislative Response*

The references in *Unico* to the Uniform Commercial Code are most interesting. For this whole debate began in earnest in the councils of the U.C.C. drafting committees, and it continues in the discussions of those presently putting together the Uniform Consumer Credit Code. It is against the background of this protracted conflict of opinion that one can perhaps best evaluate the legislative response to the use of negotiable notes and waiver clauses in consumer sales.

The original design of the Uniform Commercial Code, as it appeared in the May 1949 draft, included significant sections regulating consumer financing.[39] Among these was a provision subjecting the holder in due course of a consumer's note to the latter's contract defenses if rights were asserted against the collateral.[40] In an earlier version the Code also purported to make more difficult the attainment of due course status by adding to the ordinary subjective test of good faith ("honesty in fact") an objective standard (observance of "reasonable commercial standards").[41] Moreover, the draftsmen

36 *Id.* at 112, 232 A.2d at 411.

37 *Id.* at 125, 232 A.2d at 418.

38 *Id.*

39 UNIFORM COMMERCIAL CODE § 7-601 *et seq.* (May 1949 Draft).

40 *Id.* § 7-612.

41 UNIFORM COMMERCIAL CODE § 3-302 (1952 Official Text).

undertook to deal decisively with waiver clauses in consumer contracts. Section 9-206 of the 1952 Official Text provided as follows:

> An agreement by a buyer of consumer goods as part of the contract of sale that he will not assert against an assignee any claim or defense arising out of the sale is not enforceable by any person. If such a buyer as part of one transaction signs both a negotiable instrument and a security agreement even a holder in due course of the negotiable instrument is subject to such claims or defenses if he seeks to enforce the security interest either by proceeding under the security agreement or by attaching or levying upon the goods in an action upon the instrument.[42]

By these and related sections the Code authors took a firm stance in favor of regulating for the protection of consumer interests. But, due primarily to the exigencies of securing that consensus believed necessary for legislative success, they acceded to demands that these provisions be deleted or modified.[43] Those provisions in the original draft pertaining explicitly to consumer transactions were omitted from subsequent drafts. The standard of good faith for due course holding was modified to exclude the objective criteria introduced by the requirement of observance of "reasonable commercial standards."[44] And, most importantly, there was a basic restructuring of section 9-206 relative to waiver clauses, the effect of which was to positively encourage their use. Section 9-206(1) was amended to read as follows:

> Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.[45]

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42 *Id.* § 9-206.

43 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 293-94 (1965); Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 ILL. LAW FORUM 321, 323; Skilton and Helstead, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1468 (1967).

44 UNIFORM COMMERCIAL CODE § 3-302 (1957 Official Text). For a critique, *see* Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 S. CAL. L. REV. 48 (1966).

45 UNIFORM COMMERCIAL CODE § 9-206 (1957 Official Text).

It was in this form that the section was enacted throughout the country.[46] In sum, the more conspicuous regulatory elements were excised, and the overall thrust of the Code became decidedly one of facilitation rather than regulation.[47]

However, the effort for uniform regulation was resumed in 1964 as work began on the preparation of what will shortly be proposed for legislative adoption as the Uniform Consumer Credit Code.[48] This Code will regulate the whole spectrum of consumer credit, and it is understandable that consideration will again be given to the use of negotiable notes and waiver clauses in consumer transactions.

In the First Tentative Draft of the U3C, released in 1966, there were a number of proposed limitations upon creditors' remedies. One prohibited negotiable instruments in consumer credit sales altogether and another subjected a transferee to "all claims and defenses of the debtor against the seller arising out of the sale notwithstanding an agreement to the contrary."[49]

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46 All states except Louisiana have adopted the U.C.C.

47 *See generally* Murphy, *Facilitation and Regulation in the Uniform Commercial Code*, 41 NOTRE DAME LAWYER 625 (1966).

48 The U3C is a project of the National Conference of Commissioners of Uniform State Laws, a cosponsor of the U.C.C. The Special Committee charged with drafting responsibilities has, as of this writing (February, 1968), produced six "working drafts." The First Tentative Draft (Working Draft No. 1) was submitted to the National Conference as a Committee of the Whole at the 1966 annual meeting in Montreal. The Second Tentative Draft (Working Draft No. 4) was considered at the 1967 meeting in Hawaii. It is anticipated that a proposed final draft will be ready for promulgation by the National Conference at its annual meeting this August in Philadelphia. *See* Buerger, *Uniform Law Commissioners' Consumer Credit Project—4th Year*, 20 PERS. FIN. LAW Q. REV. 84 (1966); Dunham, *Second Draft of Proposed Uniform Consumer Credit Code Now Being Considered*, 21 PERS. FIN. LAW Q. REV. 75 (1967); Harper, *Proposed Uniform Consumer Credit Code Discussed at Annual Meeting of NCCUSL in Hawaii*, 21 PERS. FIN. LAW Q. REV. 119 (1967).

49 Section 6.101 [Negotiable Instruments Prohibited.] In a consumer credit sale it is a violation of this Code for the seller to accept a negotiable instrument as evidence of the obligation of the debtor. If the face of the instrument bears the words "consumer note" the instrument is not negotiable. An instrument negotiable in form issued in violation of this section may be enforced as a negotiable instrument by a holder in due course according to its terms. The holder in due course is not subject to any of the liabilities set forth in section 6.201 and 7.204.

Section 6.102 [Transferee Subject to Defenses Against Seller]. Except as provided in section 6.101, with respect to a consumer credit sale a transferee of the seller's rights is subject to all claims and defenses of the debtor against the seller arising out of the sale notwithstanding an agreement to the contrary.

The draftsmen made their point unmistakable—negotiable notes and waiver-of-defense clauses have no place in consumer sales transactions. Of course, this thesis did not go unchallenged. The most controversy centered upon the treatment of waiver clauses, perhaps reflecting the fact that most sales financing today does not utilize a note, but relies upon a contract which includes a waiver clause.[50] This practice probably resulted in part from the encouragement of such clauses by section 9-206 of the Uniform Commercial Code, and also from a fear that because of the battering sustained in *Childs* and its progeny the holder in due course doctrine in consumer sales was rather shaky anyway. Hence, the fire was directed primarily against the provision subjecting a transferee to "all claims and defenses of the debtor against the seller arising out of the sale notwithstanding an agreement to the contrary." Some critics seized upon the reference to "claims" of the debtor. Would this mean, for example, that the transferee could be sued for the dealer's breach of warranty?[51]

By this time (1966) there were a number of state statutory provisions, found usually in Retail Installments Sales Acts, limiting the use of waiver clauses.[52] A few statutes prescribed outright abolition.[53] Others made validity dependent upon compliance with a notice requirement.[54] For example, under the New York statute the buyer was given ten days after receiving notice of the assignment within which to notify the assignee of "facts giving rise to the claim or defense" or otherwise lose the right to assert against the assignee any

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50 Based on interviews with Mr. Max A. Denney, Executive Vice President, American Industrial Bankers Association, and Mr. Paul R. Moo, South Bend attorney and member of the Advisory Committee of the U3C project.

51 If so construed, this would open the possibility of recovery against the transferee of an amount in excess (perhaps far in excess) of the outstanding balance due from the buyer.

52 *See generally* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION (1965).

53 Alaska (Retail Installments Sales Act, 1962); Massachusetts (Retail Installment Sales and Services Act, 1966); Mississippi (Motor Vehicle Sales Finance Act, 1958); Nevada (Retail Installment Sale of Goods and Services Act, 1965); New Mexico (Retail Installment Sales Act, 1965. For citations, see note 24 *supra*.

54 California (Retail Installment Sales Act, 1959; Automobile Sales Finance Act, 1961); Delaware (Retail Installment Sales Act, 1960); Hawaii (Retail Installment Sales Act, 1963); Michigan (Retail Installment Sales Act, 1965; Home Improvement Finance Act, 1965); New York (Motor Vehicle Retail Installment Sales Act, 1956; Retail Installment Sales Act, 1957); Pennsylvania (Motor Vehicle Sales Finance Act, 1947; Home Improvement Finance Act, 1963; Goods and Services Installment Sales Act, 1966). For citations, *see* note 24 *supra*.

right of action or defense arising out of the sale which he might have against the seller.[55]

Other states had joined the ranks of these states or were in the process of doing so when the Second Tentative Draft of the Uniform Consumer Credit Code was released in 1967.[56] The negotiable note section, changed slightly, now reads as follows:

> Section 2.403. [Negotiable Promissory Notes Prohibited.] In a consumer credit sale or consumer lease the seller or lessor may not take a promissory note payable to order or to bearer as evidence of the obligation of the debtor. A promissory note payable to order or to bearer and otherwise negotiable in form issued in violation of this section may be enforced as a negotiable instrument by a holder in due course according to its terms. The holder in due course is not subject to any of the liabilities set forth in Section 5.201, 6.108(2) and 6.113(1).[57]

This section would seem to make virtually impossible the attainment of holder in due course status by the dealer's transferee. For the latter would in the ordinary situation know that the underlying transaction was a "consumer credit sale or consumer lease" and would be presumed to know that the law prohibits the seller from taking a negotiable note in such a transaction. This may not be true as regards a transferee farther down the line, and the statute seemingly recognizes the possibility of such a person qualifying and proceeding as a holder in due course.

The waiver provision was revised. Waiver clauses were outlawed, as before, and the transferee was subjected to "all claims and defenses of the debtor." But it was provided that "the transferee's liability . . . may not exceed the amount owing to the transferee at the time the claim or defense is asserted against the transferee." To further clarify this it was stated that the "[r]ights of the debtor under this section can only be asserted as a matter of defense to a claim by the transferee."[58] A proposal to offer, as an alternative, a provision pat-

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55 N.Y. PERS. PROP. LAW § 403(3) (1967).

56 In 1967 statutes invalidating waiver clauses were passed in Connecticut (Home Solicitation Sales Act), Vermont (Consumer Fraud Act), and Washington (Credit Disclosure Act). Notice type provisions were enacted in Illinois (Consumer Fraud Act) and Texas (Motor Vehicle Installment Sales Act; Retail Installment Sales Act). Finally, two states shifted from notice type provisions to outright abolition: California (Retail Installment Sales Act) and Hawaii (Retail Installment Sales Act). For citations, *see* note 24 *supra*.

57 UNIFORM CONSUMER CREDIT CODE § 2.403 (Second Tentative Draft, 1967).

58 *Id.* § 2.404.

terned upon the New York statute (but with 45 instead of 10 days as the "cut-off period") was rejected.[59]

The Committee of the Whole, meeting in Hawaii in August, 1967, went over the draft, and there emerged from this meeting yet another revision of the waiver clause provision. It was a compromise. Instead of the single provision, alternatives were adopted. Alternative A, incorporating the notice requirement but with a substantially longer time period (six months), is as follows:

> Section 2.404. [Transferee Not Subject to Defenses Against Seller if Proper Notice of Transfer Given to Buyer.] (1) With respect to a consumer credit sale or lease, other than a sale or lease primarily for an agricultural purpose, an agreement by the buyer or lessee not to assert against a transferee a claim or defense arising out of the sale or lease is enforceable only by a transferee not related to the seller or lessor who acquires the buyer's or lessee's contract in good faith and for value, who gives the buyer or lessee notice of the transfer as provided in this section and who, within 6 months after the mailing of the notice of transfer, receives no written notice of the facts giving rise to the buyer's or lessee's claim or defense. The notice of transfer shall be in writing and addressed to the buyer or lessee at his address as stated in the contract, identify the contract, describe the goods or services, state the names of the seller or lessor and buyer or lessee, the name and address of the transferee, the amount payable by the buyer or lessee and the number, amounts and due dates of the instalments, and contain a conspicuous notice to the buyer or lessee that he has 6 months within which to notify the transferee in writing of any complaints, claims or defenses he may have against the seller or lessor and that if written notification of the complaints, claims or defenses is not given within the six-month period, the transferee will have the right to enforce the contract free of any claims or defenses the buyer or lessee may have against the seller or lessor.
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> (2) A transferee does not acquire a buyer's or lessee's contract in good faith within the meaning of subsection (1) if the tranferee has knowledge or, from his course of dealing with the seller or lessor or his records, notice of substantial complaints by other buyers or lessees of the seller's or lessor's failure or refusal to perform his contracts with them and of the seller's or lessor's failure to remedy his defaults within a reasonable time after the transferee notifies him of the complaints.[60]

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59 *Id.* § 2.404, Comment.

60 UNIFORM CONSUMER CREDIT CODE § 2.404 (Working Draft No. 6, 1967). Alternative A. A comment appended to the waiver clause provision of the First Tentative Draft referred to the notice type statutes as follows: "Several states, including New York and California, have provisions requiring the buyer to give notice within a stated

Alternative B, substantially the same as the provision in the Second Tentative Draft, reads as follows:

> Section 2.404. [Transferee Subject to Defenses.] With respect to a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, a transferee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease notwithstanding an agreement to the contrary, but the transferee's liability under this section may not exceed the amount owing to the transferee at the time the claim or defense is asserted against the transferee. Rights of the buyer or lessee under this section can only be asserted as a matter of defense to or set-off against a claim by the transferee.[61]

The compromise of offering alternative formulations was preceded by a public hearing in June, 1967, in Chicago and by debate in the Committee of the Whole meeting in Hawaii later that summer. A culling of a few of the comments from these sessions may be suggestive of what can be expected on this issue as the U3C makes its way through legislative channels. The provision for abolition was hailed as "probably the most critically important to legal aid clients as far as the provisions of the Code are concerned."[62] Critics of the provision condemned it as the wrong approach which "completely undoes the [Uniform Commercial] Code."[63] It was defended as an attempt "to push the policing of the schlock merchant onto the private financial institutions, rather than let things roll along to the point where somebody decides to set up all sorts of regulatory commissions and regulatory bodies to punish the schlock merchant."[64] Another predicted it would "drive the small finance

period (commonly 10 or 15 days) to a transferee of defenses against the seller in order to preserve these defenses against the transferee. Experience has shown that a period of 10 or 15 days may be too short and that *a period of at least 30 days may be desirable.*" UNIFORM CONSUMER CREDIT CODE § 6.102, Comment (First Tentative Draft). (emphasis added). The compromise incorporated in Working Draft No. 6 not only adopted a "cut-off period" of six months, it also added, in subsection 2, an elaboration of "good faith" which would make more difficult the transferee's acquiring insulation against "claims and defenses" the buyer has against the seller. Finally, there is no provision in Alternative A, as in Alternative B, limiting the buyer to asserting his rights as a matter of defense or to set-off against a claim by the transferee.

61 *Id.* § 2.404, Alternative B.

62 Proceedings, Public Hearing on Second Tentative Draft of the Uniform Consumer Credit Code 212 (June 16-17, 1967).

63 Proceedings, Committee of the Whole, Uniform Consumer Credit Code 195 (August 1-3, 1967).

64 *Id.* at 196.

companies out of business,"[65] with the consequence that "people who need financing most are going to be least likely to get it. . . ."[66] Turning to the six month time period of Alternative A, some thought the time too long ("I'm surprised to hear anything as long as six months suggested."[67]), others thought there ought to be no time limit at all, and still others believed the six month period to be about right ("I feel that the alternative gives the buyer here a pretty fair protection."[68]). Near the end of the debate on this section, one man who thought the six month period too long ("If you can't find out what the hell's wrong with the outfit in less than six months, you are not very bright . . ."[69]) facetiously suggested: "Let's make it 123 days. That would be a unique provision."[70] The transcriber duly noted the "laughter" which followed, and the Chairman proceeded to call for a vote of the Committee. The compromise carried 26 to 18,[71] and thus the matter stands until the next round.

IV. Conclusion

This movement to limit the use of negotiable notes and waiver-of-defense clauses is indeed "proceeding in these days apace." As noted, the judicial trend has been steady, if unspectacular. The legislative response, on the other hand, has been both steady and spectacular. New statutory provisions have appeared; old ones have been strengthened.[72] One can reasonably expect this general legislative trend to continue. Finally, there is, waiting in the wings, the Uniform Consumer Credit Code, which, when finally approved and submitted for legislative adoption, will contain provisions substantially limiting, if not preventing completely, the use of negotiable notes and waiver clauses in consumer transactions.

It is not a sufficient answer to say that the abolition of the waiver clause limits freedom of contract. For in most cases these clauses are found in standard form contracts which are not read or

65 Proceedings, Public Hearing on Second Tentative Draft of the Uniform Consumer Credit Code 217. (June 16-17, 1967).

66 *Id.*

67 Proceedings, Committee of the Whole, Uniform Consumer Credit Code 212 (August 1-3, 1967).

68 *Id.* at 210.

69 *Id.* at 216-17.

70 *Id.* at 217.

71 *Id.* at 217-18.

72 Especially significant in this respect was the abandonment in two States of a notice type waiver clause provision and the substitution of outright abolition. *See* authorities cited, note 56 *supra.*

understood by the consumer purchaser. While it may be affirmed as a general proposition that there should be a goal of maximizing the freedom of contracting parties to set the terms of their agreement, and I do so affirm, just what is their agreement or contract in the prototype transaction? This whole relationship of freedom of contract and the standard form, adhesion-type contract, has long been a matter of major concern. Actually, the basic question here is not so much what contracting parties should be free to do, but whether public authority should make available legal devices which afford transferees extraordinary advantage. This is obvious in the case of the negotiable instrument, the law from the beginning insisting upon certain special requirements as to both form and method of negotiation. But it is no less apparent as regards utilization of waiver-of-defense clauses, wherein there is the achievement of a kind of "negotiability by contract." Thus viewed, the issue is whether there is sufficient reason to permit the transferee to assert a right superior to that of his transferor. One important reason for supporting such a view is that such permission would help to facilitate commercial transactions. It would encourage the free flow of commerce, with the consequence of lower credit costs for the consuming public.

This need not, and in my opinion, should not be posed as an either-or question. For even if legislatures can be persuaded to invalidate these waiver clauses, for example, might not the accomplishment prove to be illusory? If lending institutions find the risks in the purchase of consumer sales paper to be unacceptable, what will prevent a shift to a pattern of direct lending, perhaps utilizing innovative procedures yet to be devised? To be sure, in implementing such a shift there would be problems, legal and otherwise, but it is surely an underestimation of business acumen and initiative to believe the task to be impossible. Recently a very knowledgeable observer reminded us of how the problem can shift almost as soon as the solution is adopted, leaving a residue of "statutory obsolescence."[73] Moreover, in terms of the interest in securing uniform legislation on the point, there is no assurance that state legislatures can be persuaded to outlaw waiver clauses completely. There is no consensus favoring such action within the ranks of the U3C drafting committees, and this presages difficulties in securing uniform legislative acceptance.

Alternatives to all-out support or rejection should be considered, not merely because of a desire to enhance the likeihood of wide-

[73] Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461 (1967).

spread legislative success, but in an effort to provide the best method of operation. A tested method is the type proposed as a U3C alternative, the making of waiver-of-defense clauses subject to compliance with a notice requirement which gives the buyer a certain number of days to lodge complaints and thereby preserve defenses. Prescinding, for the moment, from the "numbers game" (whether the cut-off period should be 10 days as in New York, 45 days as in a Pennsylvania statute, six months as in the U3C alternative, etc.), the basic approach has evident merit.[74] It does not give carte blanche to the transferee, nor does it make impossible the attainment of insulation against buyer's defenses. Hopefully, it is possible to strike a balance which will not significantly decrease the purchasing of consumer sales paper or increase the costs thereof, while at the same time affording the consumer reasonable protection.

How long should the cut-off period, the statute of limitations as some have dubbed it, be? The danger here is that the figure will be picked arbitrarily, or by hunch, rather than being based on relevant supporting data. If this is not to occur, and if the spectacle of having the compromise figure reflect no more than tactical give and take between competing interests is to be avoided, more information will have to be supplied. What kind of information? Basically, cost data, both in terms of increased costs to the financers and the losses sustained by consumers in being forced to pay without adequate recourse against the dealer. What has been the effect upon the cost of credit in those states where the use of waiver clauses or negotiable notes has been circumscribed by statute? Does the consumer have to pay more for credit? Does he have a more difficult time obtaining credit? Has there been a squeeze-out of the small financer? Additionally, would it not be helpful, especially in setting a cut-off period for waiver clauses, to have trustworthy data as to when dealer defaults and product defects ordinarily appear? To be sure, such information would produce no more than a general pattern, but it would be something to go on, certainly preferable to the apparent

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74 "Claims of defective performance are thus available to the buyer for the limited period, but the statute also protects the assignee from fictitious defenses fabricated when the buyer discovers he is unable to pay the debt. Where there are latent defects in the goods, the risk of suing the seller is thrown upon the buyer, but considerations of the relative innocence of both parties and the desirability of a free flow of this kind of paper makes the provision seem meritorious."

Hogan, *A Survey of State Retail Instalment Sales Legislation*, 44 CORNELL L.Q. 38, 67 (1958).

blank that appears now in the published materials. If industry representatives believe the six-month period of the U3C alternative to be unreasonably long, they would be well-advised to buttress their arguments with supporting data of this type.

Anything less than total and complete invalidation of waiver-of-defense clauses in consumer sales contracts will be viewed by many as inconsistent with a commitment to "consumer protection." I would submit that our commitment should not be to securing "protection" for the consumer, but "justice." The consumer is not entitled to "protection"; he is, the same as everyone else, entitled to his due. A waiver provision incorporating a reasonable cut-off period would not be demonstrably unjust and would provide a feasible solution.